No. 77-1152

In the Supreme Court of the United States

OCTOBER TERM, 1977

BEE JAY'S TRUCK STOP, INC., a corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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INDEX

AUTHORITIES CITED

Cases

Other Authorities

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THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
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Petitioner, Bee Jay's Truck Stop, Inc., prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First District, Second Division.

Opinion Below

The opinion of the Appellate Court of Illinois, No. 76-1266, not yet reported, is appended to this Petition as Appendix A.

Jurisdiction

The opinion of the Appellate Court of Illinois, First District, was entered on August 9, 1977. Petitioner's timely Petition for Rehearing was denied by that court on September 26, 1977 (App. B). The Illinois Supreme Court denied petitioner's Petition for Leave to Appeal on November 23, 1977. (App. C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Was petitioner deprived of due process of law where a default judgment against it was affirmed solely on the basis of a statutory interpretation—Illinois' first judicial construction of the statute—which itself violates due process of law, where:

(a) if the statute was ambiguous and the court was correct judicially to rewrite it, then subjecting petitioner to such interpretation necessitated by ambiguity violates due process of law; or

(b) if the statute was clear and not ambiguous, then imposing the judicially rewritten statute upon petitioner just as equally violated its due process rights.

Constitutional Provisions and Statutes Involved

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1 . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The relevant State statutes, including the precise provisions here at issue, Chap. 120, sec. 451, Ill. Rev. Stat. 1975, are set forth as Appendix D to this Petition, pp. App. 11-12, *infra*.

STATEMENT OF THE CASE

On June 22, 1976, petitioner filed in the Circuit Court of Cook County, No. 76 L 11338, an action for administrative review of a final assessment issued by the Department of Revenue on June 3, 1976.[1] On August 23, 1976, respondent Department of Revenue of the State of Illinois filed its Motion to Dismiss Complaint and to Enter Judgment in its Favor, based solely on petitioner's failure either to have posted a bond in the amount of the assessment or to have requested the court to impose a lien in lieu of bond within 20 days after the filing of the complaint, as (assertedly) required by law.[2] The court allowed the Motion, entering judgment against petitioner.[3] Petitioner's motion to have the court impress a lien in lieu of bond[4] was denied.

See also the court's opinion (App. A) for additional details.

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[1] The final assessment was in the amount of $757,414.33; C. 2-6. ("C." refers to the Common Law Record, filed in the Appellate Court in No. 76-1266.) A breakdown of the money figures included in the judgment is contained in Exhibit A to the Complaint, C-5. Additional interest continues to accumulate.

The Department assessed the said asserted tax liability for alleged unpaid Illinois motor fuel tax, supposedly incurred in the course of petitioner's business as a truck stop.

[2] C. 7-9. See Chap. 120, sec. 434a, Ill. Rev. Stat. 1975, incorporating by reference Chap. 120, sec. 451, Ill. Rev. Stat. 1975.

[3] Judgment was entered in the amount of $842,495.73; C. 22-23.

[4] The trial court rejected petitioner's argument that the statute supporting the judgment was unconstitutional. See Supp. Rec. to the Common Law Record.

Raising the Federal Question Below

Upon respondent Department of Revenue's filing in the Circuit Court of Cook County, Illinois, its Motion to Dismiss Complaint and to Enter Judgment in its favor, based solely on petitioner's failure either to have posted a bond in the amount of the assessment or to have requested the court to impress a lien in lieu of bond within 20 days after filing the complaint, as (assertedly) required by law, petitioner in its response to the said Motion unsuccessfully argued in the trial court that the statute (here too at issue) is unconstitutional on due process grounds. The unconstitutionality of the statute was pressed in the Appellate Court of Illinois, which likewise rejected the argument. (See App. A.) The same ground was urged in petitioner's Petition for Leave to Appeal filed in the Illinois Supreme Court, which court declined discretionary review. See footnote 15, p. 9, *infra* for additional details (paragraph one thereof).

REASON FOR GRANTING THE WRIT

Where a default judgment was entered (and affirmed) against petitioner solely on the basis of a statutory interpretation (the first in Illinois) which itself violates due process of law, and petitioner thereby lost not only its lawsuit but also its day in court to litigate the merits of this gargantuan judgment (sufficient to wipe out its corporate existence), petitioner was deprived of due process of law, for:

(A) If the court's judicial rewriting of the statute was necessitated by the statute's inherent ambiguity, this renders its application to petitioner violative of due process of law;

(B) Alternatively, if the statute was clear and not ambiguous, then imposing the judicially rewritten statute upon petitioner violated due process for want of fair notice as well.

In either event, the Appellate Court read into the statute, that which is not there, in order to affirm. To right a grievous wrong, and to render an instructive opinion on the art of statutory construction, prospectively relevant in applicability to many other statutes and situations, certiorari should be allowed.

Prefatory Statement

In the first reported opinion ever to construe the lien provisions of Chap. 120, sec. 451, Ill. Rev. Stat. 1975,[5] the Appellate Court of Illinois has approved an order dismissing petitioner's lawsuit for administrative review of a final order of respondent, the Department of Revenue of the State of Illinois.

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[5] The statute is fully set forth at App. D.

The manner in which the appellate court construed (or, should we say, "reconstructed"?) the statute is so outlandish that such statutory reading violates petitioner's due process rights. Seldom does this Court have the opportunity to address itself to a question of pure statutory construction of a State statute; to whether the State courts' interpretation of an innocuous-appearing statute is *so* bizarre that to apply the statute thus deprives the subject of due process of law.

While the precise question may never again arise, certiorari should be allowed to permit this Court to render an instructive opinion on the art of statutory construction, not to mention to right a grievous wrong.

• • •

Argument

The trial court's order dismissing petitioner's complaint for administrative review and entering judgment against petitioner and in favor of respondent in the amount theretofore already administratively determined[6]—entered only and entirely on the basis that petitioner neither had posted the statutorily required bond nor had requested the court (in the alternative) to impose a lien in lieu of bond upon petitioner's property—violates petitioner's federally guaranteed right to due process of law. Whether the statute is unconstitutionally vague, as we argued in the trial court and on review in the appellate court, or not, as found by the appellate court (see App. A), the result is that petitioner has, without due process of law, been deprived of both its property and of its right to a day in court to litigate the propriety of the administrative findings.

• • •

[6] What's more, the said administrative determination is directly based upon evidence educed in a now-reversed criminal case. See footnotes 16 & 17, pp. 10 & 11, *infra* and accompanying text.

The appellate court examined the statute,[7] concluding:

> "[T]he legislature clearly intended that a taxpayer should provide either a bond or a lien as security for his tax obligation; and that such security should be provided within 20 days of filing suit for administrative review." (App. 6)

The first portion clearly is true; but as for the balance of this run-on following the semicolon and conjunction, it is a half-truth rendering the entire "sentence" a lie.

What the statute actually says, in no uncertain terms, is:

> "Any suit . . . shall be dismissed . . . unless the person filing . . . suit files . . . within 20 days after the filing of the complaint . . . a [secured] bond . . . unless the court, in lieu of said bond, shall enter an order imposing a lien. . . ." (Emphasis added.)

This distillation is the essence.

• • •

It requires no more syntactical art than one acquires in elementary school to see that the sole referent for the phrase, "within 20 days," is the verb, "files."[8]

To paraphrase[9]:

Yes, plaintiff says the statute is ambiguous; what better proof than that the court rewrote it, thereby proving it's ambiguous while saying it is not.

One picture may be worth a thousand words, but actions speak.[10]

[7] The statute in its entirety is set forth at pp. 11, 12 App. D, *infra*.

[8] See entire statute, pp. App. 11, 12, *infra*.

[9] App. 5.

[10] Yet, again, *To paraphrase*: **By their deeds you shall know them.**

Absence can mean as much as presence; when skilled draftsmen mine lines,[11] one must attend as much to what's *not* said as to what *is*.

* * *

The law's main intent—"that a taxpayer should provide either a bond or a lien as security for his tax obligation"[12]—*is* realized.[13]

The goal is fulfilled.

OR is the sword

The disjunctive syntax marking the "bond" language from the "lien" language is the sword rending the section in twain. Cloven, it can't support the reading foisted on review.

* * *

If the statute is clear as the appellate judges seem to pretend to think, then their "installation" of the time-limit upon the lien provision was so unwarranted that it amounts to judicial rewriting of a statute, in violation of the concept of constitutional separation of powers, not to mention petitioner's basic, constitutional rights.[14]

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[11] The *only* resource consulted by the appellate judges in divining the legislature's meaning was, per admission, "the language of the statute." App. 5.

[12] App. 5.

[13] "We note that plaintiff [petitioner] did petition the court to impress a lien in lieu of bond [after the instant suit was filed]." App. 5. Moreover, petitioner thereby offered to pledge *all* its assets as security against an adverse decision. (Incidentally, the entirety of petitioner's assets represents but a portion of the gargantuan judgment, payment of which in full would effectively put an end to petitioner's corporate life.)

[14] See footnote 15, pp. 9-10, *infra*.

Flipping the coin, if it was so ambiguous as to require rewriting, then due process was violated by the vagueness.[15]

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[15] Petitioner argued in the trial and appellate courts that the statute is unconstitutionally vague, for reasons herein set forth. The corollary alternative argument—that the statute, if clear, should not have been rewritten—was not raised in those courts (though it was, of course, in the petition we filed in the Illinois Supreme Court); for not until the appellate judges rewrote it did the issue first arise.

* * *

The statute does *not* provide a reasonable plaintiff with sufficient notice that if he does *not* request the court to impose a lien within 20 days after filing the lawsuit, then, no bond yet having been posted, the suit will be dismissed and judgment by default entered against him.

The statute is vague as to the time-period within which, absent the posting of bond, a plaintiff must request the court to impose, in lieu of bond, a lien upon property or have his case dismissed and judgment entered against him. While it is clear from the face of the statute that bond must be posted within 20 days after filing suit, it is *not* equally clear when the court may order, or when plaintiff may (or must) request, that a lien be imposed in lieu of bond. The statute is *silent* as to the time within which a plaintiff's request for such alternative security be filed. It is likewise *silent* as to the time within which such order may be entered.

That such order may be entered *only* upon a plaintiff's *inability* to secure a bond strongly implies that one shall have opportunity *within* that 20-day period to attempt to secure bond, failing which, one may *thereafter*—**after** expiration of the said 20 day period—petition the court to impose a lien in lieu of bond.

The appellate court ignores these provisions and implications.

At best, the statute is unclear as to the pertinent time-period.

Thus, to impose such grave consequences violates due process.

* * *

On the other side of the coin, if the statute was as clear as the appellate judges would have it (see App. 5), then to rewrite it as

(footnote continued)

The criminal judgment, the underlying facts of which founded the civil judgment herein attacked,[16] has been

(footnote continued)
they did amounts to subjecting petitioner to a statute of which he had not adequate notice.

So rewritten—whether ostensibly for "vagueness" or "clarity"—its application to petitioner herein violates due process of law; for due process commands that *every man be entitled to fair and adequate notice of those laws by which he must live.*

* * *

While the statute's consequences are not literally or directly "penal," the effect of the court's orders surely are. Petitioner has had judgment imposed against it and has lost its day in court to challenge the administrative decision giving rise to the assessment and judgment, even though it now stands ready to have a lien imposed to protect the judgment. See footnote 13, p. 8, *supra*, and footnotes 16 & 17, *infra*.

Penal consequences may *not* be imposed upon one who did *not* have reasonable warning that such would ensue following any given action or inaction on *his* part. Due process will not countenance the imposition of sanctions without such notice and warning. And *no* notice or warning is sufficient if one can not reasonably be expected to know what action (or inaction) on *his* part will reap such "rewards." *United States* v. *Harris*, 347 U.S. 612, 617; *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-52; *Lanzetta* v. *New Jersey*, 306 U.S. 451. As the entry of judgment by default against petitioner without permitting a day in court surely is penal in nature, the above principles and cases duly apply.

Significantly: a civil judgment resulting from a determination in a criminal case—see footnotes 16 & 17, *infra* and accompanying text—amounts to a quasi-penal action subject to the notice requirements of due process of law. Thus, while no criminal sanctions *per se* apply, what has happened here **must be deemed subject to the due process notice mandate**. See *Robinson* v. *Hanrahan*, 409 U.S. 38; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700, 702.

[16] It is not disputed that the judgment in this civil case resulted from evidence educed during a now-reversed criminal case; the respondent Department's determination of the amount assertedly due in the civil case came directly from the record in the criminal case.

reversed.[17] Still petitioner stands liable for a sum spelled out in those proceedings, though now they are null.

* * *

Penultimatum

Petitioner has been deprived of its day in court, and of its property, on the basis of a reading of the statute which not only violates due process, but is also just plain wrong, **any way you look at it.**

If the ultimate goal of *this* reviewing court—truly, the Court of last resort—be the righting of wrongs, we pray that Your Honors perceive the opportunity here and now to take this case; for if in the end our laws be subject for their daily, basic interpretation to the whims of those who have no idea how to read a statute,[18] then we have descended from a notion of laws to that nation of men from which our forebears thought to rise.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be allowed to review the decision of the Appellate Court of Illinois, First District.

Respectfully submitted,

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[17] See *People* v. *Massarella and Bee Jay's Truck Stop, Inc., et al.*, ... Ill.App.3d ....., No. 61346, decided September 13, 1977 (1st District, 2nd Division).

[18] See footnote 11, p. 8, *supra*.

APPENDIX

APPENDIX A

In The

APPELLATE COURT OF ILLINOIS
First District — Second Division

76-1266

BEE JAY'S TRUCK STOP, INC., a corporation,
Plaintiff-Appellant,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Defendant-Appellee.

Mr. Presiding Justice Downing delivered the opinion of the court (August 9, 1977):

Plaintiff, Bee Jay's Truck Stop, Inc., appeals from an order of the circuit court which dismissed plaintiff's complaint for review of a final assessment issued by defendant, the Department of Revenue of the State of Illinois.[1] De-

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[1] The final assessment was made in accordance with the protest and hearing procedures set forth in Ill. Rev. Stat. 1975, ch. 120, par. 443. That section and section 451, the focus of this opinion, are both contained within the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1975, ch. 120, pars. 440 *et seq.*), and, along with certain other provisions of that Act, are made applicable to the Motor Fuel Tax Law (Ill. Rev. Stat. 1975, ch. 120, pars. 417 *et seq.*) by Ill. Rev. Stat. 1975, ch. 120, par. 434a.

fendant, after a hearing, had assessed plaintiff's tax liability for unpaid Illinois motor fuel tax in the amount of $757,414.33, plus interest. The circuit court granted defendant's motion to dismiss plaintiff's complaint for review because plaintiff failed to post a bond in the amount of the assessment or to petition the court for a lien in lieu of bond within 20 days of filing suit as required by Ill. Rev. Stat. 1975, ch. 120, par. 451. In addition, the circuit court entered judgment in defendant's favor for $842,495.73, the final assessment plus further interest.

On review plaintiff asserts it lost its day in court. On the other hand, defendant urges that, because this court lacks jurisdiction to hear it, plaintiff's appeal must be dismissed. Plaintiff contends that section 451 is unconstitutionally vague and, therefore, violates due process requirements. For the reasons expressed herein, we believe that this court has appropriate jurisdiction and that the challenged statute is constitutional.

I.

Defendant claims that this court does not have jurisdiction because the filing of bond in the circuit court was a statutorily imposed jurisdictional prerequisite. Since plaintiff failed to post, within 20 days of filing suit for review, either a bond in the amount of the assessment or, within said 20 days, to petition the court for a lien in lieu of bond, defendant maintains that plaintiff is now barred from pursuing appellate review. We disagree.

Article VI, section 6 of the 1970 Illinois Constitution states that appeals from final judgments of the circuit court are a matter of right with certain exceptions not here applicable. The section also provides that this court has "such powers of direct review of administrative action as provided by law." (1970 Ill. Const., art. VI, sec. 6.)

From this article defendant deduces that a bond was required because there is no constitutional right to appeal from administrative proceedings; and the right to appeal from such proceedings is not necessarily essential to due process, but is a right which may or may not be granted in a given situation as the legislature reasonably deems appropriate (*Board of Education* v. *County Board of School Trustees* (1963), 28 Ill. 2d 15, 18, 191 N.E.2d 65; *Board of Education* v. *Gates* (2nd Dist. 1974), 22 Ill. App. 3d 16, 20, 316 N.E.2d 525).

Defendant's analysis is lacking in two respects. First, whether plaintiff's right to appeal emanates from either the Constitution or the legislature is of no importance in this case if, in fact, plaintiff has such a right. Second, the instant appeal is not an appeal from administrative proceedings. Although plaintiff's complaint in the circuit court was for review of defendant's decision in an administrative hearing, plaintiff's appeal in this court is an appeal from the circuit court's order granting defendant's motion to dismiss plaintiff's complaint and entering judgment in defendant's favor. Thus, plaintiff's action in the court below was for administrative review; plaintiff's appeal in this court is for review of a final order or judgment.

Even if plaintiff did not properly exercise its administrative rights by posting bond, plaintiff nevertheless has a right to appellate review. Nothing in section 451 bars this appeal. Furthermore, that section specifically invokes the Administrative Review Act (Ill. Rev. Stat. 1975, ch. 110, pars. 264 *et seq.*). Section 276 of that Act provides:

> "Any final decision, order or judgment of the Circuit Court entered in an action to review a decision of an administrative agency may be reviewed by the Appellate Court and Supreme Court in accordance with Sections 4 and 6 of Article VI of the Constitution of the State of Illinois."

This section has been amended (effective October 1, 1976) since the institution of the present appeal. Such amendment only strengthens our statement of jurisdiction and clarifies our reasons therefor:

> "A final decision, order or judgment of the Circuit Court, entered in an action to review a decision of an administrative agency, is reviewable by appeal as in other civil cases."

We emphasize that the amendment was necessitated by the 1970 Constitution in order to correct language and erroneous references and to clarify ambiguous meanings. Ill. Rev. Stat. 1976, ch. 110, par. 276, amended by P.A. 78-711, §1, eff. Oct. 1, 1973; P.A. 79-1366, §17, eff. Oct. 1, 1976; see also Ill. Ann. Stat., ch. 110, par. 276 (Smith-Hurd supp. 1977).

While we do not approve of plaintiff's failure to post bond or to petition the court for a lien in lieu of bond within 20 days, such failure did not eliminate plaintiff's right to appellate review.

II.

Plaintiff contends that the circuit court's dismissal of its complaint for review violated due process in that it effectively deprived plaintiff of its right to a day in court to litigate the propriety of defendant's administrative findings. Furthermore, plaintiff maintains that it was deprived of its property without due process of law in that the statute pursuant to which the dismissal was ordered is unconstitutionally vague. The pertinent portion of Ill. Stat. 1975, ch. 120, par. 451 states:

> "Any suit under the 'Administrative Review Act' to review a final assessment or revised final assessment issued by the Department under this Act shall be dismissed on motion of the Department or by the

> court on its own motion, unless the person filing such suit files, with the court, within 20 days after the filing of the complaint and the issuance of the summons in the suit, a bond with good and sufficient surety or sureties residing in this State or licensed to do business in this State or unless the court, in lieu of said bond, shall enter an order imposing a lien upon the plaintiff's property as hereinafter provided. * * *"

In particular, plaintiff complains that the statute is vague because, while it clearly provides that a suit for review will be dismissed if bond is not posted within 20 days from the filing of suit and the issuance of summons, the statute is not clear that the 20-day period is equally applicable to the alternative procedure of having the court impress a lien in lieu of bond. Plaintiff urges that section 451 contemplates allowing a plaintiff 20 days in which to seek sufficient bond by surety and, if then he is unable to procure bond, he may *thereafter* request the court to impress a lien. We note that plaintiff in the case at bar did petition the court to impress a lien in lieu of bond several months after plaintiff filed suit for review.

The resolution of plaintiff's contention turns on the question of legislative intent. The cardinal rule of statutory construction is that the true intent and meaning of the legislature must be ascertained and given effect. (*People ex rel. Kucharski* v. *Adams* (1971), 48 Ill. 2d 540, 543, 273 N.E.2d 7; *Droste* v. *Kerner* (1966), 34 Ill. 2d 495, 503, 217 N.E.2d 73; *Jackson* v. *Civil Service Com.* (1st Dist. 1976), 41 Ill. App. 3d 87, 91, 353 N.E.2d 331.) Such legislative intent is sought primarily from the language used in the statute, which affords the best means of its exposition. (*Department of Public Works & Buildings* v. *Schon* (1969), 42 Ill. 2d 537, 539, 250 N.E.2d 135; *Berwyn Lumber Co.* v. *Korshak* (1966), 34 Ill. 2d 320, 323, 215 N.E.2d 240.)

After examining the language of the statute, we have concluded that the legislature clearly intended that a taxpayer should provide either a bond or a lien as security for his tax obligation; and that such security should be provided within 20 days of filing suit for administrative review. Thus, when a statute is plain and unambiguous, there is no need to resort to statutory construction. *Nordine* v. *Illinois Power Co.* (1965), 32 Ill. 2d 421, 428, 206 N.E.2d 709; *Beckmire* v. *Ristokrat Clay Products Co.* (2nd Dist. 1976), 36 Ill. App. 3d 411, 415, 343 N.E.2d 530.

Yet plaintiff argues that section 451 is ambiguous. Plaintiff's apparent contention is that if the legislature intended the 20-day time limit to apply to the imposition of liens, the legislature would have repeated the phrase, "within 20 days," when it mentioned liens. Plaintiff is evidently urging that the absence of the repeated phrase prevents this court from applying the same time limitation to both bonds and liens. We think it sufficient to note that where, as here, the main intent and purpose of the legislature can be determined from a statute, words may be modified, altered, or even supplied so as to obviate any inconsistency with the legislative intention. *Community Consolidated School District No. 210* v. *Mini* (1973), 55 Ill. 2d 382, 386, 304 N.E.2d 75; *Trustees of Schools* v. *Sons* (1963), 27 Ill. 2d 63, 68, 187 N.E.2d 673.

Plaintiff also contends that since it has lost its day in court to challenge the administrative decision, the effect of the circuit court's order of dismissal is penal in nature. Although one cannot be held criminally or quasi-criminally responsible for conduct which he cannot reasonably understand to be proscribed (*City of Chicago* v. *Witvoet* (1st Dist. 1975), 30 Ill. App. 3d 386, 388, 332 N.E.2d 767), plaintiff was not convicted of a crime in this case. Section 451

is not a penal statute because it did not describe plaintiff's acts (or failure to act) as an offense (*People* v. *Graf* (1st Dist. 1968), 93 Ill. App. 2d 43, 48, 235 N.E.2d 886), nor did it authorize any punishment for any act or failure to act (*cf. People ex rel. Kubala* v. *Kinney* (1962), 25 Ill. 2d 491, 492-493, 185 N.E.2d 337).

Plaintiff is also in error when it contends that section 451 is penal in nature. The object of the statute is not to inflict a punishment on a party for violating it (*Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.* (7th Cir. 1951), 191 F.2d 912, 914), or even to impose a penalty for transgressing its provisions (*M. H. Vestal Co.* v. *Robertson* (1917), 277 Ill. 425, 428, 115 N.E. 629; *Diversey* v. *Smith* (1882), 103 Ill. 378, 390). In essence, section 451 placed an affirmative duty on plaintiff to act, rather than a prohibition. Plaintiff needed only to post bond or petition the court for a lien in lieu of bond within 20 days. Its failure to comply with reasonable procedural requirement resulted in the dismissal of its complaint for review. Section 451 is neither penal, nor indefinite. An enactment will be considered adequately definite if it prescribes the duty imposed in terms definite enough to serve as a guide to one who has the involved duty imposed upon him so that he is enabled by reading the enactment to know his rights and obligations thereunder. *City of Decatur* v. *Kushmer* (1969), 43 Ill. 2d 334, 336, 253 N.E.2d 425.

Lastly plaintiff argues that its complaint for review was erroneously dismissed because it has a meritorious challenge to defendant's final assessment. Even plaintiff concedes, however, that the matters it raises in support of its asserted meritorious challenge are outside the record of this appeal. A reviewing court determines a case on the record only and will not consider anything which is not

in the record. (*Bettenhausen* v. *Guenther* (1944), 388 Ill. 487, 491, 58 N.E.2d 559; *Stewart* v. *Stewart* (1st Dist. 1975), 35 Ill. App. 3d 236, 240, 341 N.E.2d 136.) Nothing plaintiff contends has convinced us to depart from these well established principles.

In summary, therefore, we hold (1) that this court has jurisdiction to review the circuit court's order; and (2) that the challenged statute, Ill. Rev. Stat. 1975, ch. 120, par. 451, is neither unconstitutionally vague, nor violative of due process. Accordingly, we affirm the order of the circuit court of Cook County dismissing plaintiff's complaint for review and imposing judgment in defendant's favor.

Affirmed.

STAMOS and PERLIN, J.J., concur.

APPENDIX B

ORDER OF APPELLATE COURT
(Filed Sept. 26, 1977)

Plaintiff-Appellant's petition for rehearing is hereby denied.

APPENDIX C

In The

SUPREME COURT OF ILLINOIS

No. 50051

BEE JAY'S TRUCK STOP, INC.,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

ORDER
(November 23, 1977)

Petition for Leave to Appeal from Appellate Court, First District is denied.

APPENDIX D

Statutes Involved

Chap. 120, sec. 434, Ill. Rev. Stat. 1975, provides:

"§ 434a. *Application of the Retailers' Occupation Tax Act*

The provisions of Sections 4, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, and 5j, 8, 9, 10, 12 (except to the extent to which the minimum notice requirement for hearings conflicts with that provided for in Section 16 of this Act) and 13½ of the 'Retailers' Occupation Tax Act', approved June 28, 1933, as amended, which are not inconsistent with this Act, shall apply as far as practicable, to the subject matter of this Act to the same extent as if those provisions were included in this Act." (Footnotes omitted; the Section 12 of the "Retailers' Occupation Tax Act" referred to herein is Chap. 120, sec. 451, below.)

Chap. 120, sec. 451, Ill. Rev. Stat. 1975, provides, in pertinent part:

"§ 451. *Review under Administrative Review Act*

* * *

The provisions of the 'Administrative Review Act', and the rules adopted pursuant thereto, shall apply to and govern all proceedings, for the judicial review of final administrative decisions of the Department hereunder. The term 'Administrative Review Act' to review a final assessment or revised final assessment issued by the Department under this Act shall be dismissed on motion of the Department or by the court on its own motion, unless the person filing such suit files, with the court, within 20 days after the filing of the complaint and the issuance of the summons in the suit, a bond with good and sufficient surety or sureties residing in this State or licensed to do business in this State or unless the court, in lieu of said bond, shall enter an order imposing a lien upon the plaintiff's

property as hereinafter provided. When dismissing the complaint, the court shall enter judgment against the taxpayer and in favor of the Department in the amount of the final assessment or revised final assessment, together with any interest which may have accrued since the Department issued the final assessment or revised final assessment, and for costs, upon which judgment execution may issue as in other cases. The lien provided for in this Section shall not be applicable to the real property of a corporate surety duly licensed to do business in this State. The amount of such bond shall be fixed and approved by the court, but shall not be less than the amount of the tax and penalty claimed to be due by the Department in its final assessment or revised final assessment to the person filing such bond, plus the amount of interest due from such person to the Department at the time when the Department issued its final assessment to such person. . . .

If the court finds in a particular case that the plaintiff cannot procure and furnish a satisfactory surety or sureties for the kind of bond required herein, the court may relieve the plaintiff of the obligation of filing such bond, but shall enter an order, in lieu of such bond, subjecting the plaintiff's real and personal property (including subsequently acquired property), situated in the county in which such order is entered, to a lien in favor of the Department. Such lien shall be for the amount of the tax and penalty claimed to be due by the Department in its final assessment or revised final assessment, plus the amount of interest due from such person to the Department at the time when the Department issued its final assessment to such person, and shall continue in full force and effect until the termination of the proceedings for judicial review, or until the plaintiff pays, to the Department, the tax and penalty and interest to secure which the lien is given, whichever happens first. . . ." [Footnote omitted.]